CHART 1

CINCINNATI
OHIO
MAYSVILLE
PORTSMOUTH
VANCEBURG
ASHLAND
HUNTINGTON
CHARLESTON
W.VA
KY.
VA.
BECKLEY
PRINCETON
BLUEFIELD
WYTHEVILLE
PULASKI
MARION
ABINGDON
BRISTOL
JOHNSON CITY
KINGSPORT
MORRISTOWN
BULLS GAP
MASCOT
JEFFERSON CITY
KNOXVILLE
TENN
N.C.
BRYSON CITY
SYLVA
HENDERSONVILLE
WAYNESVILLE
CANTON
ASHEVILLE
MORGANTON
MARION
HICKORY
NEWTON
LENOIR
N WILKESBORO
ELKIN
MT AIRY
GALAX
TRYON
GAFFNEY
GREENVILLE
SPARTANSBURG
TOCCOA
SENECA
WILLIAMSTON
ANDERSON
CORNELIA
GAINSVILLE
LAURENS
NEWBERRY
RUTHERFORDTON
LINCOLNTON
MAIDEN
SHELBY
KINGS MT
GASTONIA
FORT MILL
CONCORD
CHARLOTTE
MACKSVILLE
STATESVILLE
KANNAPOLIS
ALBEMARLE
MONROE
ROCK HILL
LANCASTER
KERSHAW
CAMDEN
COLUMBIA
LEXINGTON
SALISBURY
THOMASVILLE
ASHEBORO
WINSTON-SALEM
GREENSBORO
HIGH POINT
MADISON
MARTINSVILLE
BLACKSBURG
RADFORD
ROANOKE
ROCKY MOUNT
BEDFORD
LYNCHBURG
BUENA VISTA
WAYNESBORO
STAUNTON
HARRISONBURG
SHENANDOAH
LURAY
FRONT ROYAL
WINCHESTER
MARTINSBURG
HAGERSTOWN
FREDERICK
MD.
VA.
WASHINGTON
MANASSAS
WARRENTON
CULPEPER
ORANGE
CHARLOTTESVILLE
FARMVILLE
ALTAVISTA
CHATHAM
DANVILLE
REIDSVILLE
SOUTH BOSTON
RICHMOND
PETERSBURG
BLACKSTONE
VICTORIA
CHASE CITY
EMPORIA
SUFFOLK
NORFOLK
WILLIAMSBURG
NEWPORT NEWS
FRANKLIN
VA.
N.C
ROXBORO
WARRENTON
ROANOKE RAPIDS
LITTLETON
OXFORD
HENDERSON
ELIZABETH CITY
EDENTON
PLYMOUTH
WASHINGTON
GREENVILLE
WILSON
TARBORO
ROCKY MOUNT
RALEIGH
SILER CITY
SANFORD
BURLINGTON
HILLSBORO
DURHAM
SMITHFIELD
GOLDSBORO
DUNN
CARTHAGE
PINEHURST
SOUTHERN PINES
FAYETTEVILLE
TROY
KINSTON
NEW BERN
MT OLIVE
WARSAW
CLINTON
ST PAULS
LAURINBURG
LUMBERTON
FAIRMONT
DILLON
WHITEVILLE
WILMINGTON
WALLACE
BURGAW
JACKSONVILLE
BEAUFORT
ATLANTA
BUFORD
WINDER
ATHENS
ELBERTON
CALHOUN FALLS
GREENWOOD
S.C.
GA.
FLORENCE
TIMMONSVILLE
SUMTER
MANNING
ORANGEBURG
ST GEORGE
CHARLESTON

LEGEND

- ● Scheduled Stop
- o Flag Stop
- – Mail Pick-up

PIEDMONT AVIATION, INC.

Specific Routes Proposed By
Application Dated May 29, 1944
Total Route Miles—4965

Office - Supreme Court, U. S.
FILED
JUL 2 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 159

PIEDMONT AVIATION, INC., *Petitioner*

against

STATE AIRLINES, INC., *Respondent*

PETITION OF PIEDMONT AVIATION, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

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PIEDMONT AVIATION, INC., *Petitioner*

against

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PETITION OF PIEDMONT AVIATION, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, **Piedmont Aviation, Inc.,** respectfully shows to this Court:

STATEMENT OF THE MATTER INVOLVED.

Petitioner is an air carrier engaged in transporting persons, property and mail by aircraft in the United States. It operates pursuant to a certificate of public convenience and necessity which was issued to it by the Civil Aeronau-

ties Board on December 12, 1947 under the Civil Aeronautics Act of 1938, as amended (52 Stat. 977 ff., 49 U. S. C. §§ 401-680). State Airlines, Inc., the Respondent here, was an unsuccessful applicant before the Civil Aeronautics Board for the certificate which was issued to the Petitioner.[1]

Section 401(a) of the Act provides that no air carrier shall engage in any air transportation without holding a certificate issued by the Board and authorizing such transportation. Sections 401(b) and (c) provide for the filing of applications for certificates in such form and containing such information as the Board may require, for the giving of public notice of such applications, and for the holding of hearings thereon. Section 401 (d) provides that the Board shall issue a certificate authorizing "the whole or any part of the transportation covered by the application" if it finds: (1) "that the applicant is fit, willing and able to perform such transportation properly", and (2) "that such transportation is required by the public convenience and necessity."

Pursuant to section 401(b) of the Act, Piedmont filed an application with the Board on May 29, 1944. (28-61). This application requested that Piedmont be awarded a certificate authorizing the transportation of passengers, property and mail on the numerous specific routes shown in color on Chart 1, which is inserted opposite this page.

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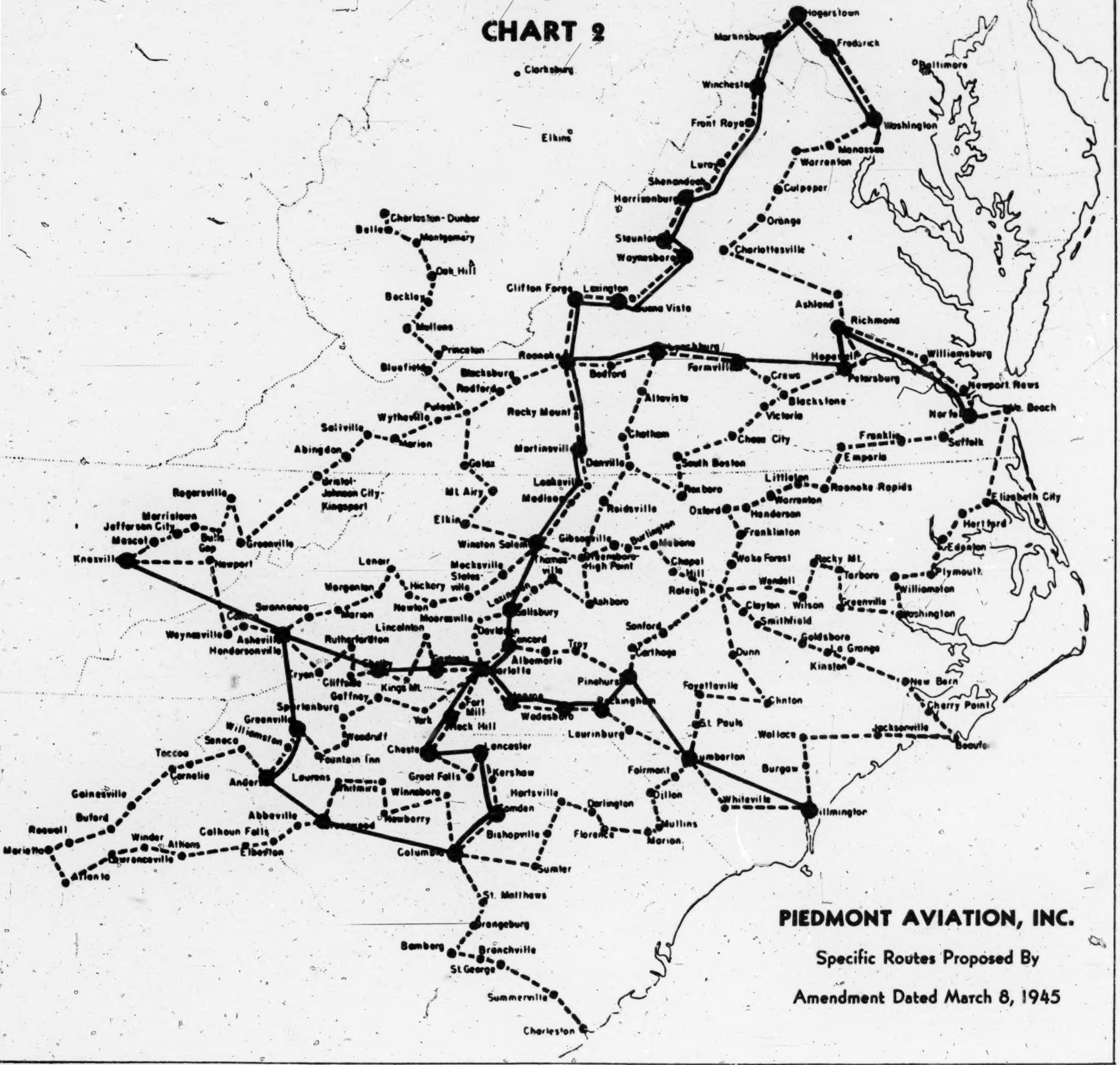
[1]In the court below, State was the petitioner seeking review of the Board's order issuing the certificate, the Board was the respondent, and Piedmont, your Petitioner, was an intervenor. In addition to the present petition of Piedmont, the Solicitor General is filing a petition for certiorari on behalf of the Board. Piedmont urges that both these petitions be granted.

In this petition and accompanying brief the Civil Aeronautics Board and its predecessor, the Civil Aeronautics Authority, will be called the "Board". The Civil Aeronautics Act of 1938 (Act of June 23, 1938, c. 601, 52 Stat. 977 ff., 49 U. S. C. § 401-680) will be called the "Act". Petitioner will be called "Piedmont", and State Airlines, Inc., will be called "State".

All italics are ours unless otherwise specified.

Numerical references in parentheses refer to pages of the printed Record filed with this Court.

CHART 2



PIEDMONT AVIATION, INC.

Specific Routes Proposed By

Amendment Dated March 8, 1945

Study of Chart 1 will reveal that these routes form a comprehensive network in the broad area bounded by Washington, D. C., Norfolk, Wilmington, N. C., Charleston, S. C., Atlanta, Knoxville and Cincinnati. The routes have a total length of 4,965 miles. (43).

In addition to requesting the specific routes shown on Chart 1, Piedmont's application also requested "such modification of such routes as the Board may find public convenience and necessity require" and "such other and further relief, general and specific, under section 401 [of the Act] as the Board may deem appropriate." (31, 41).

By February 24, 1945, numerous other corporations had also filed applications for certificates authorizing air transportation in the southeastern part of the United States. On that date the Board entered an order which "consolidated into one proceeding" the application of Piedmont described above, certain applications which had been filed by State, and numerous applications by other parties. This proceeding was designated the Southeastern States Case. (27).

Thereafter, about March 8, 1945, Piedmont filed an amendment to its application. (62-71). Under the amendment Piedmont specifically applied for a certificate authorizing the transportation of passengers, property and mail on certain routes and the transportation of property and mail on other routes. These routes are set forth on Chart 2 on the opposite page. Chart 2 shows that here again Piedmont specifically applied for a comprehensive network of air routes.[2] The routes total 5,763 miles in length, and cover a broad area bounded by Washington, Norfolk, Wilmington, N. C., Charleston, S. C., Atlanta, Knoxville, and Charleston, W. Va. (653, 652).

---

[2] The Court of Appeals in its opinion below printed a map which purports to show the routes for which Piedmont specifically applied (676, top map). *However, that map is erroneous because it failed to print most of the routes for which Piedmont did specifically apply. The true picture is set forth in Charts 1 and 2 in this petition.*

Piedmont's application as amended also contained a general request for authority to carry *passengers* as well as mail and property "on the routes described herein," referring to *all* the routes described in the application. (41, 63).

Furthermore, Piedmont's application as amended requested "such modification of such routes [referring again to all the routes specified in the application] as the Board may find public convenience and necessity require," and such "further relief, general and specific, under section 401 as the Board may deem appropriate." (63, 41).

A hearing was held before an Examiner of the Board in June 1945. At that time Piedmont, State and 23 other applicants presented evidence in support of their applications. After considering the evidence and hearing argument, the Board issued its original opinion on April 4, 1947. (565; 7 C.A.B. 863-941).

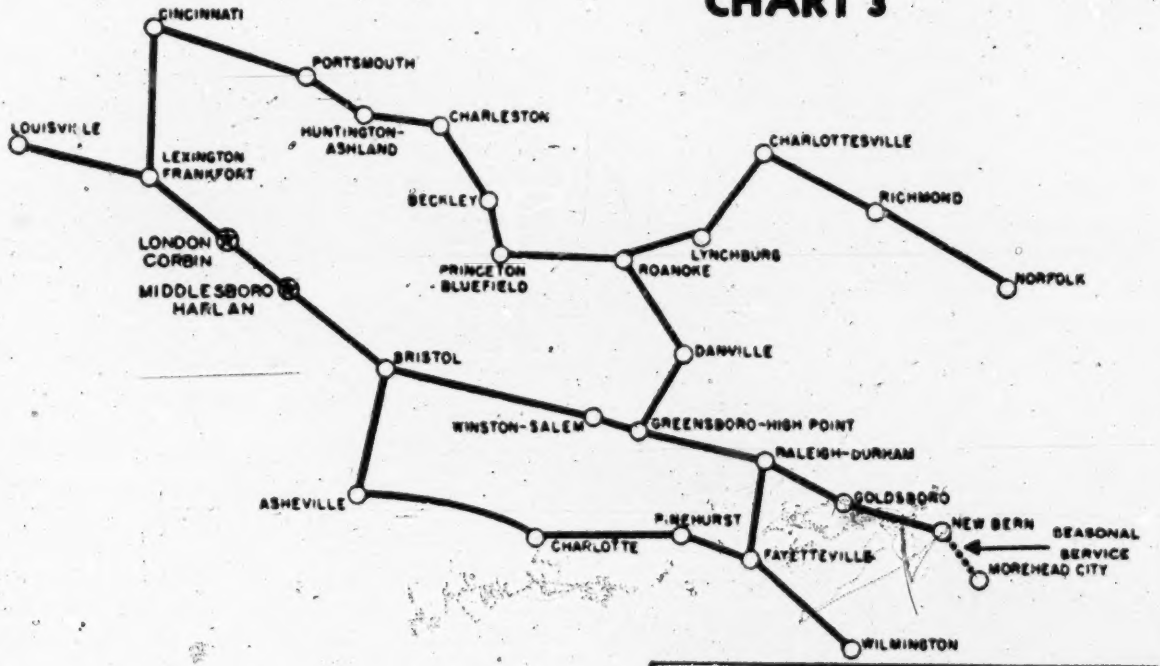
In its opinion the Board found that the public convenience and necessity require the transportation of passengers, property and mail on the routes shown on Chart 3, which is inserted opposite this page. (565, at 892-896). A study of this Chart will show clearly that the routes selected by the Board are covered by Piedmont's application. Whereas Piedmont had applied for specific routes extending for many thousands of miles (and for modification of these routes as the Board might see fit), the Board found service required on only 1,700 route miles. The routes selected by the Board cover a smaller area than that which Piedmont proposed to serve, and they conform to a substantial degree with routes proposed by Piedmont.

In its opinion of April 4, 1947, the Board made the following additional findings:

(1) Piedmont was an applicant to perform the transportation which the Board had thus found to be required. (565, at 898, 901).

(2) Three of the applicants (Gillespie, Blue Grass and Commonwealth) "met the test of fitness, willingness

CHART 3


CINCINNATI
PORTSMOUTH
LOUISVILLE
HUNTINGTON-ASHLAND
CHARLESTON
LEXINGTON FRANKFORT
BECKLEY
CHARLOTTESVILLE
RICHMOND
LONDON CORBIN
MIDDLESBORO HARLAN
PRINCETON - BLUEFIELD
ROANOKE
LYNCHBURG
NORFOLK
BRISTOL
DANVILLE
WINSTON-SALEM
GREENSBORO-HIGH POINT
RALEIGH-DURHAM
GOLDSBORO
ASHEVILLE
PINEHURST
NEW BERN
SEASONAL SERVICE
CHARLOTTE
FAYETTEVILLE
MOREHEAD CITY
WILMINGTON
LEGEND
ROUTES AUTHORIZED FOR PIEDMONT 4/4/47
BOARD ADDED THESE POINTS 10/13/47

and ability", but the business interests of those companies were centered in Tennessee, Kentucky and Ohio, and the public interest would be better served by awarding a certificate to some one of the other applicants "whose activities are conducted in, and who have close ties with, the area [North Carolina and Virginia] embracing a major portion of the local system herein prescribed." (565, at 899).

(3) Piedmont was fit, willing and able to perform the transportation found required, and was better qualified than State (or any other applicant) to perform such transportation. (565, at 899-902)

After the issuance of this original opinion, State petitioned the Board for reconsideration insofar as the Board had awarded the route system in question to Piedmont rather than to State. (566). As requested by this petition, the Board reopened the case and heard argument on the points raised by State. (573). *On December 12, 1947 the Board issued a supplemental opinion and unanimously reaffirmed its award to Piedmont.* (610-620) This supplemental opinion expressly reaffirmed the findings made in the original opinion, including the finding that Piedmont was in fact an applicant for the routes awarded. (616).

On the same day, December 12, 1947, the Board issued the certificate of public convenience and necessity to Piedmont. Under the terms of the certificate and of the Act Piedmont commenced airline operations within a short period of time, and is continuing to render service on the routes awarded it.

A petition for review was filed by State with the United States Court of Appeals for the District of Columbia Circuit, and Piedmont intervened. On April 6, 1949 that court rendered a decision which would reverse the order of the Board on the following grounds:

1. Piedmont was not an applicant to perform the transportation authorized by the certificate. (681)

2. The Board was without the power to issue a certificate to any applicant which did not specifically describe in its application, with no more than slight variations, the exact route system which the Board might find to be required. (682, 683)

3. Piedmont was not fit, willing, and able to render the transportation which was authorized. (683, 685)

4. The orders and findings of the Board were "arbitrary and capricious and lacked the support of substantial evidence." (686)

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the judgment and decree of the United States Court of Appeals by virtue of the following statutory provisions: 28 U. S. C. § 1254 (see Pub. L. 773, 80th Cong., 2nd Sess. ch. 646), and § 1006 (f) of the Civil Aeronautics Act of 1938 (52 Stat. 1024; 49 U. S. C. § 646 (f)).

THE QUESTIONS PRESENTED.

1. Is it within the power of the Court of Appeals to substitute its own judgment for the judgment of the Board as to whether the transportation authorized by the certificate was covered by Piedmont's application?

By Section 1006 (e) of the Act, the findings of facts by the Board are made conclusive, if supported by substantial evidence. By Section 401 (b) of the Act the form of the application and the information contained therein are such as the Board may require. By Section 1001 the Board is authorized to conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice.

The Act does not require an application to describe the authority requested in terms of cities to be served or routes to be followed. Piedmont's original application proposed

service specifically to at least 23 of the 28 cities found by the Board to require service in the area under consideration and, like most of the other applications, requested a certificate with such modifications of the proposed route plan as the Board might find to be required by the public convenience and necessity. As amended, Piedmont's application requested even broader operating authority, and the Board expressly found that Piedmont was in fact an applicant for the routes awarded.

The court below stated that this question (as to whether Piedmont was an applicant for the routes awarded) was a "fundamental question of fact". (681) But notwithstanding this statement, the court below erroneously substituted its own finding for the finding of the Board.

2. If, in fact, a portion of the transportation authorized by the certificate was not covered by Piedmont's application, is the Board for that reason without power under the Act to include in the certificate the points not so covered?

The Act provides that upon the appropriate findings, the Board shall issue a certificate authorizing "the whole or any part of the transportation covered by the application." Nowhere in the Act is there found any provision which prohibits the Board from adding to the certificate the obligation to serve points not covered by the application. On the contrary, Section 401 (f) provides that "there shall be attached to the exercise of the privileges granted by the certificate . . . such reasonable terms, conditions and limitations as the public interest may require".

This Court has held, under similar provisions of the Motor Carrier Act, that the Interstate Commerce Commission has clear power to include in a certificate authority for service substantially greater than the carrier had asked, and to many points the carrier had not requested. *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *U. S.*, 322 U. S. 1.

The Court of Appeals, in its opinion, completely and erroneously ignored Section 401 (f) of the Act and said decision of this Court.

3. When the Board in its expert judgment has found that Piedmont was fit, willing and able to perform the transportation, may that determination be set aside by the Court merely because the evidence offered by Piedmont was not sufficient, in the judgment of the Court, to show its fitness, willingness and ability to perform a portion of the transportation which involved operations west of the Appalachians or over mountainous terrain?

The court below set aside the Board's finding that Piedmont was fit, willing and able to conduct the service authorized. (683-685.) In doing so, the court clearly overstepped the bounds of permissible judicial review.

Piedmont submitted abundant evidence of its fitness, willingness and ability. Counsel for State, the rival applicant, of necessity conceded to the Board that Piedmont was fit, willing and able to conduct the service authorized. (607.) Section 1006 (e) of the Act provides that no objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board. Therefore, it was error for the court below even to consider the fitness, willingness and ability of Piedmont.

Furthermore, the court's conclusion to set aside the Board's finding was based solely on the substitution of its own judgment for that of the Board as to the inferences to be drawn from evidence actually in the record. The court's previous erroneous finding (that Piedmont was not an applicant for service west of the Appalachians) was compounded here by the erroneous finding that Piedmont's evidence could not show its fitness, willingness and ability to operate across the mountains.

4. If all of the foregoing questions should be decided adversely to Piedmont, should not the judgment of the Court be a modification of the Board's order only to the extent of eliminating from Piedmont's certificate a few points west of the Appalachians?

The surgeon here has resorted to amputation at the neck to cure a disease of the foot. There has never been a question in anyone's mind as to the fitness, willingness or ability of Piedmont to operate that portion of the routes lying in North Carolina and Virginia (which is the major portion of the routes certificated), or that its application was sufficiently broad to cover that portion of the routes. If there is any question as to the propriety of certificating Piedmont to operate the western portion of the routes, or if it should eventually be determined that the entire route system should be operated by some other applicant, the public interest would obviously be better served by remanding the case to the Board with the eastern portion of the certificate still in effect, subject to being vacated upon further hearing by the Board. Under such a decree the Board could permit the operation of the western segments by an exemption order issued pursuant to Section 416 (b) of the Act, while further hearings were being held. This procedure would permit the communities of five States to continue to receive the benefits of an existing air transportation system to which the Board found these communities entitled more than two years ago.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The United States Court of Appeals for the District of Columbia Circuit has decided an important question of federal administrative law which has not been, but should be, settled by this Court. This important question involves the conclusiveness of Board findings as to the scope of applications before the Board for certificates of public convenience and necessity.

2. The Court of Appeals has not given effect to an applicable decision of this Court. The decision in the case of *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *United States*, 322 U. S. 1, should have required said court to hold that the Board had the power to include in Piedmont's certificate points in the general area under consideration which Piedmont had not specifically asked to serve.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings with respect to review of the expert judgment of an administrative body for a specialized field as to call for an exercise of this Court's power of supervision.

These reasons are discussed in Piedmont's attached brief.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding said Court to certify and send to this Court a full and completed transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled in its Docket No. 9748, STATE AIRLINES, INC., *Petitioner* vs. CIVIL AERONAUTICS BOARD, *Respondent*, PIEDMONT AVIATION, INC., *Intervenor*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the order of said Court of Appeals be reversed by this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No.

PIEDMONT AVIATION, INC., *Petitioner*

against

STATE AIRLINES, INC., *Respondent*

BRIEF OF PIEDMONT AVIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The decision of the court below appears in the Record before this Court. (675.) It is not yet officially reported.

The statement of this Court's jurisdiction, and the statement of the case, have already been set forth in the attached petition for writ of certiorari.

SPECIFICATION OF ERRORS.

I.

The Court of Appeals erred in holding that Piedmont was not an applicant for the routes awarded. The Board's finding that Piedmont was an applicant for said routes was a finding of fact with respect to which the Court could not substitute its own judgment for the expert judgment of the Board.

II.

The Court of Appeals erred in holding that the Board could not include in a certificate routes and points not applied for by the recipient of the certificate.

III.

The Court erred in substituting its own judgment for the expert judgment of the Board and setting aside the Board's finding of fact that Piedmont was fit, willing and able to operate the routes awarded to it.

IV.

The Court of Appeals erred in directing that the Board's order be completely set aside rather than modified only to the extent required to conform to the principles announced by the court's decision.

SUMMARY OF ARGUMENT.

The Board has been endowed by Congress with unusually broad powers to establish the route pattern, and to control the development, of an air transportation system which now blankets the nation and also encircles the globe. A narrow circumscription of these powers, in the manner of the court below, contravenes the clear Congressional intent in delegating the powers, and furthermore, denies to the Board the reasonable freedom of action which any administrative agency must have.

It is the Board, not the court, which has the expert judgment necessary to give proper weight to all the facts of record and to make ultimate findings of fact. This well-established principle is particularly applicable in a case such as this, where the Board had before it a factual record covering thousands of pages and involving the air service needs of a large area of this country. In the exercise of its expert judgment the Board has considered the multitudinous facts in this record and has found that Piedmont was in fact an

applicant for the routes awarded it. The court below improperly usurped the function of the Board when it set aside this finding of fact.

The Act provides that an application for a certificate shall be in such form and shall contain such information as the Board shall require; and it further provides that the Board's findings of fact shall be conclusive, if supported by substantial evidence. Here the Board found that Piedmont's application met the requirements of the Board and that Piedmont was in fact an applicant for the routes certificated. Since there was ample and very substantial evidence to support this finding of fact, the court below acted improperly when it substituted its own finding for the finding of the Board. As we have shown in the attached petition, Piedmont applied for specific routes serving nearly all the cities finally certificated and also conforming to a substantial degree to the very routes which were ultimately awarded. Furthermore, Piedmont's application (like that of other applicants) contained a "catch all" clause and a request for relief under Section 401 of the Act, the clear effect of which was to make Piedmont an applicant for any routes in the area which the Board might find required. Hence the Board's finding of fact was entirely proper and must be sustained.

Even if it be assumed *arguendo* that Piedmont was not in fact an applicant for certain portions of the route system awarded it, the Board nevertheless had full power to award the certificate in question to Piedmont. The decision of this Court in *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *United States*, 322 U. S. 1, clearly establishes the power of the Interstate Commerce Commission to award a certificate under similar circumstances, and should be controlling here. Section 401 (f) of the Act empowers the Board to include in a certificate "such reasonable terms, conditions and limitations as the public convenience and necessity may require". Construed in such a manner as to serve the public interest, this power surely means that the Board, when

certificating an applicant for services applied for, may add "terms" and "conditions" requiring other service for which no application was made but which the Board has found required. The court below wholly ignored the controlling effect of the decision of this Court and of Section 401 (f).

Furthermore, the court below erroneously set aside the Board's finding that Piedmont was fit, willing and able to operate the routes awarded it. The Board's finding of fact was supported by substantial evidence, indeed by overwhelming evidence, of Piedmont's fitness willingness and ability to serve the very routes for which it was certificated. The finding was set aside by the court below on the untenable ground that *none* of Piedmont's evidence on this point could be considered by the Board as to Piedmont's fitness, willingness and ability to serve points for which Piedmont did not apply. This was a matter to be decided by the expert judgment of the Board, not by the legalistic hypotheses of a reviewing court.

If this Court should fail to reverse the decision below in its entirety, it should at least order a modification of the decree proposed by the court below. The decree below is unreasonably harsh because it would apparently require the Board to rescind Piedmont's certificate in its entirety. Any such rescission would necessarily mean that the many cities in question would be deprived of an existing air service even though all parties to this case are agreed that these cities have a substantial need for the service. Therefore, should this Court do nothing else, it should certainly modify the decree to conform to the principles announced below. Those principles would permit the Board to continue part of Piedmont's certificate in effect (and issue an exemption order as to the remainder) while further proceedings were being held. By modifying the decree in this way this Court would avert irreparable injury to the public interest.

POINT I.

Piedmont was an applicant for the routes awarded to it. The Board's finding to this effect was a finding of fact which the Court is without power to set aside.

As shown by Chart 1 in the attached petition, Piedmont's original application specifically proposed service to all of the points included in the certificate except the few on the Y-shaped extension resulting from the inclusion of service to Louisville. Chart 2 in the attached petition shows that Piedmont's amended application also specifically proposed service to nearly all the cities certificated, and it specifically proposed service along a very substantial portion of the routes certificated. Also there was a request by Piedmont for modification of such routes as the Board might see fit, and for plenary relief under section 401 of the Act. The Board, after considering all these requests and the nature of the proceeding in which they were made, expressly found that Piedmont was an applicant for the routes awarded. It was error for the court below to substitute its own finding for that of the Board on this point.

The map which the court below included in its opinion (676, top map) does not correctly reflect the situation because it admittedly purports to show only a part of the service proposed by Piedmont in its application. The court assumed to modify the actual scope of the application by eliminating all points described therein except those for which Piedmont applied in the sense that it "actively, by brief and by oral argument before the Board, sought". (679). While the court adopted with ease and unconcern this, its own concept of a modification of the application, it wholly ignored the fact that before the certificate was finally issued, Piedmont, by brief, by oral argument, by letter and by formal written motion, was earnestly and vigorously requesting the Board to issue to it a certificate in the identical form in which it was finally issued. The court would thus recognize that form of modification of a request which conforms to its own judgment as to the proper result, and

deny recognition to those forms of modification which conform to the result arrived at by the Board.

However, the fundamental error of the court was its refusal to give proper effect and meaning to Piedmont's application "for such modification of such routes as the Board may find public convenience and necessity require" and for "such other and further relief, general and specific, under Section 401 [of the Act] as the Board may deem appropriate." In concluding that these requests were not intended to make Piedmont an applicant for the routes which the Board found required, the court had recourse to dictionary definitions of the word "modification" in total disregard of the history and circumstances surrounding the requests in Piedmont's application. The court has wholly failed to apply the principle so aptly stated by Justice Holmes in *Towne* v. *Eisner*, 245 U. S. 418, that, "A word is not a crystal, transparent and unchanged; *it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*"

Piedmont, in its application, sought authority to engage in scheduled air transportation "on the routes detailed herein, or such modification of such routes as the Board may find public convenience and necessity require", and also sought plenary relief under Section 401. Practically every other application in the proceeding contained, in varying phraseology, clauses of similar import and intendment. Many examples of what had come to be known before the Board as the "catch all" clause may be found in this proceeding. (665-670). Whatever the variations in individual expression, these clauses had come to have a well-defined meaning when used in proceedings before the Board, and this meaning renders resort to dictionaries unnecessary and improper.

The purpose of these clauses was to inform the Board, and any rival applicants, that the applicants making use of the clauses were applicants for any routes which might be awarded in a pending proceeding, whether or not such routes should correspond to the routes proposed by the applicants or any of them.

Before the present case came to hearing the Board had considered such "catch all" clauses and had given clear notice to all concerned that it would construe these clauses liberally in the light of the facts of each case. In the *North Atlantic Routes Case*, 6 C.A.B. 319, the Board had decided that three routes should be established across the continent of Europe. Giving a broad interpretation to the "catch all" clause in various applications, the Board had transposed routes freely in the public interest. American Export, which had specifically applied only for a route across *central* Europe, was awarded a route across *northern* Europe. Pan American, which had specifically applied only for routes across *northern* Europe and across *southern* Europe, was awarded a route across *central* Europe. TWA, which had specifically applied for a route across *central* Europe, was awarded a route across *southern* Europe. The Board went to great lengths in a unanimous opinion on this point to show that the "catch all" clauses of these various carriers in fact contemplated the awards which were made. (6 C.A.B. at 345-350).

The Board has frequently considered such "catch all" clauses, and has given many practical examples as to whether a particular enlargement or change in a specific route pattern would be found as a fact to be within the scope of the clause. Thus in the *Rocky Mountain States Case*, 6 C.A.B. 695, the Board held that the inclusion, in the certificate issued to Summit Airways, of service to Salt Lake City, Utah, as a terminal point, was appropriate although this point did not appear on any of Summit's proposed routes and its inclusion involved as extension from Evanston, Wyoming, the most westerly point specifically proposed by Summit.

So also, in the *North Central Case*, 7 C.A.B. 639, Iowa Airplane Co. applied specifically only for routes emanating out of Des Moines, Iowa to other points which were *within the state of Iowa.* Nevertheless the Board found that service was required on routes extending from Des Moines as far north as Minneapolis/St. Paul, Minnesota, as far north-

west as Huron, South Dakota, and as far west as North Platte, Nebraska. Under all of the circumstances of that case the Board found that Iowa Airplane Co., by virtue of its "catch all" clause, was an applicant for these routes, and the Board certificated the company to serve these routes even though most of the route mileage lay outside the state of Iowa.

On the other hand, the Board held in the *Panagra Terminal Investigation Case*, 4 C.A.B. 670, that an extension of Panagra's routes over some 1,200 miles from the Canal Zone to some terminal point in the United States was too great a change to be deemed a modification of its existing route structure. Similarly, in the *West Coast Case*, 6 C.A.B. 961, it held that the application of Los Angeles Airways, specifically proposing service out of Los Angeles to points no farther north than Bakersfield and Santa Maria, was not broad enough to justify its selection under its "catch all" clause for routes extending hundreds of miles north to Medford, Oregon.

The foregoing examples clearly show that the basic determination is one of *fact*. Whether a particular application with its "catch all" clause is an application for a route found required by the Board, is a question which must be determined by the Board on the basis of all the *facts* of record. That the question is one of fact and not of law is clearly indicated in the case of *W. R. Grace & Co.* v. *Civil Aeronautics Board*, 154 F. (2d) 271. In that case the Circuit Court of Appeals for the Second Circuit held that there was no requirement *of law* that a written application contain a substantially accurate point-by-point description of the routes to be certificated. There the court further held that the written consent of a carrier to serve a route determined to be necessary is the legal equivalent of a full dress application for such route. On rehearing, the Court said:

> "But we adhere to the view that a *consent* by a carrier to a 401 (h) extension proceeding begun by the Board is the *legal equivalent of a petition for the same* extension initiated by the carrier." (154 F. (2d) at 287)

The solution of this question of fact in each case must be based upon factors such as the length of the mileage of the extended service, the amount of additional capital required to operate it, and the operating problems to be encountered. No fixed value can be assigned to any of these factors, and their individual weight and aggregate effect necessarily involve the exercise of expert judgment based on specialized knowledge and experience in a field which Congress has entrusted to the Board. In the exercise of its judgment, the Board expressly found as follows:

> "Piedmont's application, when viewed in the light of all pertinent factors, shows that this carrier was, within the meaning of Section 401 (d), an applicant for the routes awarded it." (616)

This finding cannot be set aside by the Court. The case falls squarely within the rule announced by this Court in the case of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the Agency—of course it must not be set aside because the reviewing Court might have made a different determination were it empowered to do so." (318 U. S. at 94)

Upon the foregoing we submit that Piedmont was, beyond any question of doubt, an applicant before the Board for the routes certificated to it. Its status as such was not properly subject to challenge by the Court.

POINT II.

The Board clearly has the power to include in a certificate the obligation to serve points which the applicant did not ask to serve in its written application. It was error for the court below to rule otherwise.

Assuming, without conceding, that Piedmont's application did not request operations to the few points west of the Appalachians which were not included in its route proposals, nevertheless the Board was not thereby precluded from requiring service to these points. The decision below would prevent the Board from requiring such service and would thereby frustrate the fundamental purposes of the Act. For example, the result would be that after an investigation over a period of years had demonstrated a public need for air transportation from Cincinnati, Ohio to Charlottesville, Virginia, along with many other pints, and after one or more applicants had been found fit, willing and able to perform satisfactory service in the area, all applications would have to be rejected and the investigation begun all over again because the applicants who proposed to serve Cincinnati did not propose to serve Charlottesville and those who proposed to serve Charlottesville did not propose to serve Cincinnati.

It was to prevent such a ridiculous result that Congress made express provision in the Act that the Board should not be bound to issue a certificate upon terms in form and substance as proposed by an applicant, but might add thereto such terms and conditions as the public interest might require. Section 401 (f) of the Act provides that:

> ". . . there shall be attached to the exercise of the privileges granted by the certificate . . . such reasonable terms, conditions and limitations as the public interest may require."

What could be more reasonable in the public interest than to condition the privilege of operations to points requested upon the assumption of the obligation to extend the service

to other points in the same area which the Board finds to need the service, and which the Board finds the applicant fit and able to serve?

Any doubt which might otherwise exist that the Board has this power has been laid to rest by the decision of this Court in the case of *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* v. *United States,* 322 U. S. 1.

That case arose under Part II of the Interstate Commerce Act, known as the Motor Carrier Act, particularly under Sections 207 (a) and 208 (a) thereof. Section 207 (a), like Section 401 (d) of the Civil Aeronautics Act, empowered the Commission to issue a certificate, "authorizing the whole or any part of the operations covered by the applications." Section 208 (a), like Section 401 (f) of the Civil Aeronautics Act, provides that there shall "be attached to the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require . . ."

In that case the motor carrier applicant had actually stated its unwillingness to serve numerous points, and had no "catch all" clause in its application. Yet the Commission issued a certificate authorizing service to the points in question, and the applicant accepted the certificate.

On review this Court said:

> "The question of law in the case is whether the Commission on its finding need for such service had power to authorize service of intermediate points *not asked for by the applicant.* The applicant has accepted and is defending the grant, but the competing rail carriers complain of it." (322 U. S. at 3)

This Court then held that under the authority conferred by Section 208 (a):

> "It is clear that the Commission on the facts found had power to include in the authorization *provision for service greater than the carrier had asked.*" (322 U. S. at 4)

The Court of Appeals, in its opinion below, failed to mention said Section 401 (f) or said decision of this Court. On the contrary, it said that this question of the Board's power under the circumstances was "a question not hitherto posed before any other court so far as we are aware." (682). The court's failure to consider the applicable section of the statute and the applicable decision of this Court permitted it to fall into the error which it has committed.

POINT III.

The Court of Appeals has erroneously substituted its own judgment for the judgment of the Board by finding that Piedmont is not fit, willing and able to perform the transportation certificated. The finding of the Board stood unchallenged before the Board, and therefore is not subject to review. Furthermore, this is a matter peculiarly within the specialized field entrusted to the Board and the judgment of the Board thereon is conclusive.

The court below reviewed the Board's finding of Piedmont's fitness, willingness and ability, and ruled that this finding was arbitrary, capricious and without any evidence to support it. (684). This is perhaps the most glaring error committed by the court. For the court to set itself up as having ability superior to that of the Board as to what attributes, characteristics and special skills shall constitute evidence of an applicant's fitness and ability to operate an air transportation system over a given route, is to negative the whole purpose of Congress to entrust this field to the specialized experience and expert knowledge of the Board.

In the first place, it is to be observed that the court based its conclusion upon a most limited and restricted view of the evidence and a positive non-legal standard adopted by itself as to what evidence the Board may consider on the point. There has never been any question but that there was adequate evidence to establish Piedmont's fitness, willingness and ability to conduct operations serving all of the certificated points in Virginia and North Carolina, where

the major portions of the routes are located. *In fact, it was conceded by counsel for State that Piedmont's qualifications had been amply shown for all the routes awarded.* When asked by the Chairman of the Board the specific question whether State was taking the position that Piedmont was not capable of operating the routes to be certificated, counsel stated:

> "We are taking the position that *both State and Piedmont are fit and able;* it's a question of which has demonstrated in this record to be *more* fit, willing and able." (607)

The real basis of the court's holding is not that there was a total absence from the record of Piedmont's fitness, willingness and ability, but that, because Piedmont had not specifically asked in its application to serve Louisville and the other points west of the Appalachians, the Board could not properly consider *any* evidence offered by Piedmont of its fitness, willingness and ability in a case where service to those points was to be included in the certification. This is made perfectly plain by the statement at page 20 in State's reply brief below with reference to its counsel's admission of Piedmont's qualifications:

> ". . . it is plain that counsel was endeavoring to make the point that an abstract finding of fitness, willingness and ability could be of no avail to Piedmont *as Piedmont had not applied for the routes in question.* Counsel continued the line of thought with the suggestion that if the Board 'selected American Air Lines for a route that they didn't apply for and didn't put in any evidence for and weren't an applicant, I would say that that didn't belong to them no matter how able they were.' "

It is also made clear by the fact that the Court, in its opinion, did not find absence of evidence of fitness and ability of Piedmont generally, but only with respect to the points "west of the Appalachians and over mountainous terrain." (684).

This finding by the court is all the more remarkable because there is not a scintilla of evidence in the record that operations extending to Cincinnati and Louisville required any other, different or additional qualifications by the operator than were required for operations to Roanoke, Virginia; Princeton, Bluefield, Beckley and Charleston, West Virginia; Asheville, North Carolina; and Bristol and Knoxville, Tennessee; service to all of which was specifically proposed by Piedmont. A glance at any appropriate topographical map demonstrates that service to all of these latter points involves operations over "mountainous terrain," such as that which the court, without any foundation in the evidence, seemed to regard as a formidable hurdle for air transportation to surmount. Where has the court acquired the expert knowledge to enable it to judge whether or not the technical ability to cope with elevations of four to five thousand feet is insufficient to cope with elevations a thousand or so feet higher? The court was obviously transcending its proper sphere of authority when it assumed to characterize as absurd the position taken by the Board's counsel that the same fitness and ability which would qualify an applicant to operate from Hagerstown to Norfolk would also qualify it to operate from Jacksonville to Miami. (685).

Instead of pointing out wherein it considered Piedmont's evidence of fitness, willingness and ability insufficient to show its ability to operate the routes certificated, the court below concentrated on a single statement of Piedmont's counsel. (684) This statement pointed out that *one* of Piedmont's routes followed the Shenandoah Valley and crossed the Blue Ridge Mountains only at a point where they were very low. The court below would have us believe that this was a fair characterization of *all* of the operations concerning which Piedmont offered any evidence of its fitness and ability. Reference to the record where this statement is set forth (553) makes it clear that this remark of counsel was directed only to a *single* route proposed by Piedmont, that from Columbia, South Carolina to Washington, and was not intended to be offered as a description

of Piedmont's entire proposed route system. The remark was introduced by the statement at the top of the cited page:

> "I would like to discuss first the proposed route from Columbia, South Carolina to Winston-Salem, and from Winston-Salem to Washington." (553)

The court below overlooked and failed to notice the following pertinent items of evidence put into the record by Piedmont which were most certainly considered by the Board to be relevant to Piedmont's fitness and ability to conduct operations to points west of the Appalachians and over mountainous terrain:

(1) As shown by flight logs of only four of its pilots, Piedmont had conducted at least 28 actual flights from Winston-Salem, N. C., to points west of the Appalachians, to wit, Cincinnati, Ohio; Huntington-Ashland, Charleston and Beckley, West Virginia; and Middlesboro-Harlan, Kentucky. (292)

(2) In addition to the flights just mentioned, the same pilots had flown at least 93 actual flights from Winston-Salem to points such as Bristol, Asheville, Knoxville and Roanoke, all of which involved operations over mountainous terrain. (292)

(3) Furthermore, Piedmont had conducted very extensive charter flights from its base at Winston Salem (289, 466); and Cincinnati and Chicago were among the most frequent destinations (445).

The court's assertion that the record is barren of any evidence of Piedmont's fitness, willingness and ability to operate the routes certificated is nothing more than a continuation of its original erroneous conclusion that Piedmont was not an applicant for these routes and affords no justification for setting aside the Board's finding to the contrary.

POINT IV.

Should this Court fail to reverse the order of the Court of Appeals in its entirety, said order should at least be modified to the extent that it shall provide, instead of invalidating Piedmont's certificate in its entirety, that there be continued in effect that portion of the routes as to which Piedmont unquestionably applied and proved its fitness, willingness and ability.

It will be observed that Piedmont, in its original application, specifically proposed service to every point named in the certificate except Louisville, Lexington-Frankfort, Middlesboro-Harlan and the seasonal stop at Morehead City. Even if the scope of Piedmont's application should be restricted by its amendment to the eastern portion of the routes (as the court below has found), nevertheless Piedmont specifically applied to serve Charleston, W. Va., Bristol, Va.-Tenn., Asheville, N. C., and all points on the certificated routes lying easterly thereof. Route 3 of the three routes awarded to Piedmont, the route from Roanoke to Wilmington, N. C., was entirely within the admitted scope of the application and the proof. The elimination of the six cities west of the above-named points from routes 1 and 2 (less than one-quarter of the total number certificated) would leave the award of the remainder of these routes entirely within the admitted authority of the Board.

Such a modification of the decree below would be manifestly in the public interest. It would mean the 28 cities presently certificated would not be deprived, during a reinvestigation by the Board, of an existing efficient public service which all parties agree that they need. If a portion of Piedmont's certificate were left in effect, the Board could, under Section 416 (b) (1) of the Act, provide by an exemption order for the continuation of service to the other cities involved while it re-examined in accordance with the principles announced by the Court the question whether Piedmont, State, or some other applicant should operate all or any part of the presently certificated routes. Under the order of the court below, the existing service would appar-

ently be destroyed since there is no provision in the Act by which Piedmont, without some existing effective certificate, could receive the mail pay upon which its economic existence as a carrier is dependent. Such a modification of the order below could not injure State since in no event could State secure a certificate until further proceedings could be conducted by the Board.

Modification of the order below as here proposed is required by the principles announced by this Court to govern the conduct of the courts in their function of reviewing administrative orders. In *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, where the Administrator had made a determination found invalid by the Court, this Court said:

> "But that leaves the difficult problem of the proper disposition of the case. *It is our view that the case should be remanded to the district court with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.*
>
> "Such an adaptation of court procedure to a remodeling of the situation as nearly as may be to what it should have been initially is not unprecedented. Such was essentially the procedure which was devised to unravel the skein in United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795. The Court did not feel itself balked by the kind of considerations that seemed controlling to a Baron Parke. The creative analogies of the law were drawn upon by which great equity judges, exercising imaginative resourcefulness, have always escaped the imprisonment of reason and fairness within mechanical concepts of the common law." (322 U. S. at 618, 620)

In that case the Court re-emphasized the principle previously stated in the *Morgan* case as follows:

> ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated ob-

jects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." (322 U. S. at 621)

We submit that such a modification as we propose is clearly indicated by these principles. The decree below, without modification, plainly violates these principles to the great detriment of the public interest.

CONCLUSION.

The Court of Appeals, in its decision below, clearly overstepped the bounds of permissible judicial review. It committed serious error at the outset when it substituted its own finding of fact for that of the Board as to the scope of Piedmont's application. It then intensified the error by completely ignoring a decision of this Court which should have demonstrated to it that the Board had full power to issue the certificate to Piedmont. Further, the court below committed glaring error when it overruled the Board's expert judgment of Piedmont's fitness, willingness and ability. Following all this, the court entered a decree which is unreasonable even in the light of its own rulings.

This tragedy of errors clearly calls for this Court to grant Piedmont's petition for a writ of certiorari.

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